UNITED NATIONS

AT

Administrative Tribunal

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ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 528

Case No. 527: HOSSAIN

Against: The Secretary-General of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Roger Pinto, President; Mr. Ahmed Osman, Vice-President; Mr. Samar Sen;

Whereas, on 11 July 1989, Mohammed Akhtar Hossain, a former staff member of the United Nations Development Programme (UNDP), filed an application that did not fulfil all the formal requirements of article 7 of the Rules of the Tribunal;

Whereas, on 16 November 1989, the Applicant, after making the necessary corrections, again filed an application, containing pleas which read in part as follows:

SECTION - II. Pleas

(a) I. Before proceeding to consider the merits of the case I would like to request the Tribunal, in accordance with para. 2 of provision 20902 of the UNDP Personnel Manual for locally recruited staff, to arrange for hearing of the following witness on my behalf:

Mr. Manjurul Islam (or Manjurul Huq) Auditor, Bangladesh Water Development Board, WAPDA Building, Motijheel Commercial Area, Dhaka.

...

(a) II. For equitable and fair administration of justice the case may be remanded for correction of the procedures in accordance with article 9,

paragraph 2 of the Statute of the Tribunal and accordingly, compensation equivalent to three months net base salary should be paid to me for the loss caused me by the procedural irregularities and delay.

...

(d) Compensation:

Provided I am reinstated to the previous position, I would like to claim a further compensation equivalent to amount of my:

(i) Net base salary for the period from 1 April 1987 to date;

(ii) Medical benefits as per individual maximum annual level of entitlements for myself, spouse and 2 dependent children for the period from 1 April 1987 to date.

OR

If I am separated from the service of United Nations for the interest of good administration I would like to claim a compensation equivalent to US$ 100,000 (one hundred thousand US$) for the following reasons:

(i) I have entered the UNDP/WFP [World Food Programme] service at the age of about 25 years and continued up to the age of about 35 years; maximum age limited to entry into Government/Civil service is 27 years. So, I can't get a Govt. service at any cost;

(ii) Since I have been terminated by the UNDP Administration after being suspended the possibility of employment with other national/international or private organizations is nil for me and hence for the rest of my life I will have to lead a miserable life being unemployed and dilapidated mentally and physically.

(e) Any other relief: I would further like to request the Tribunal that my within grade salary increment which was withheld by the Administration may kindly be withdrawn effective December 1987. At

> the same time I would like to request the Tribunal that since my name was recommended by the WFP Administration to the UNDP, Dhaka, vide a memo dated 1 December 1985 for a probation leading to permanent appointment, my appointment may kindly be converted into permanent status."

Whereas the Respondent filed his answer on 27 December 1990;

Whereas the Applicant filed written observations on 14 March 1991;

Whereas, on 22 April 1991, the Applicant requested postponement of his case;

Whereas, on 8 May 1991, the Tribunal granted the Applicant's request for postponement until its next session in October 1991;

Whereas the Applicant filed an additional written statement on 23 September 1991;

Whereas the facts in the case are as follows:

The Applicant entered the service of the United Nations on 11 December 1978, on a three month and 21 day fixed-term appointment, at level 6, step 1, as a Field Officer at the UNDP Office in Bangladesh, serving with the World Food Programme (WFP). His appointment, limited to service with the WFP in Bangladesh, was successively extended for further fixed-term periods of different duration, the last appointment expiring on 31 March 1988.

During the course of his employment with UNDP, the Applicant's performance was evaluated in several performance review and staff development reports (PRR). The Applicant was initially rated as "a competent and well-qualified staff member, whose performance meets expected standards" and "an excellent staff member whose performance exceeds expected standards". Then, in a performance report covering the Applicant's period of service from November 1985 to April 1987, his supervisor stated that the Applicant's performance since October 1985 had been "disappointing". Despite warnings from his senior colleagues about his conduct, he had "continued acting in ways which [brought] into disrepute WFP's standing with Government officials..." and "displayed a poor sense of responsibility and lack of integrity". The Applicant was rated "A staff member whose performance is unsatisfactory".

While on official mission at Comilla, on 16 March 1987, the Applicant and another staff member were involved in an incident with a woman, whom they engaged for illegal activities. A statement signed by 19 persons attested to the incident.

On 13 May 1987, the Director of Operations, WFP, recommended to the UNDP Resident Representative that the Applicant "be suspended with immediate effect pending his dismissal for misconduct". In a note dated 10 May 1987, attached to the memorandum, the Director of Operations explained the reasons for his recommendation. He gave his account of a series of incidents concerning the Applicant which, according to him, brought into question the Applicant's integrity.

On 25 May 1987, the Resident Representative appointed an Investigation Committee "to investigate the allegations about the [Applicant] as detailed in the attached note of 10 May 1987; to review such other facts pertinent to the [Applicant's] performance relevant to the request for suspension; and to report and make recommendations".

On 9 June 1987, the Resident Representative suspended the Applicant from duty, with full pay, pending the outcome of the investigation, in accordance with staff rule 110.3. His decision was "noted" on 16 June 1987 by the Deputy Director, Department of Personnel, UNDP, who awaited the Investigation Committee's report.

On 19 August 1987, the Investigation Committee submitted its report. Its conclusions and recommendations concerning the Comilla incident read as follows:

> "... Conclusions and Recommendations
>
> 22. The conclusions and recommendations in respect of each allegation made against Mr. Hossain are as follows:
>
> ...
>
> (v) Comilla Incident - 1987 - the IC [Investigation Committee] concludes that:
>
> (a) Mr. Hossain was involved in the 'immoral behaviour' which took place. Although direct

evidence is not available, based on his previous behaviour pattern it is likely that Mr. Hossain would have been involved.

(b) The moral character and behaviour of Mr. Hossain over several years does not meet the standard required of a WFP Field Officer; that WFP has been lax in monitoring such standards.

(c) The related administrative actions of Mr. Hossain were inappropriate, including delays in cancellation of schemes and lack of information flow to WFP management about the incident, and this behaviour strongly reinforces arguments that he was involved and that this affected his work performance."

As regards the other allegations, the Committee found that they could not be sustained and recommended that they be investigated further.

The Investigation Committee recommended:

"23. ...

(i) Given Mr. Hossain's past behaviour pattern, and his involvement in the Comilla incident in particular, the recommendation of the IC is that Mr. Hossain's conduct does not meet the standards required of a WFP Field Officer. If more specific evidence were available (from WFP investigations of the various cases for example) this would justify also termination of duties. Based on present evidence, however, the IC is forced to rely for its opinion on circumstantial evidence and Mr. Hossain's overall behaviour which the IC believes warrants termination of Mr. Hossain's contract. ...

(ii) The apparently unusual (according to WFP management) number of incidents/allegations involving Mr. Hossain certainly justified a much closer supervision by WFP of Mr. Hossain than appears to be the case, as well as a much more aggressive approach to investigating the various allegations made against Mr. Hossain.

(iii) WFP management should properly investigate and document such allegations, rather than leave the evidence at the level of uncontested hearsay. Due process should also be followed in informing the staff member and permitting appropriate responses to such allegations. The consequences of not doing so are perfectly illustrated by the difficulties faced by the IC in this case."

On 17 September 1987, the Resident Representative submitted to UNDP Headquarters a copy of the Investigation Committee's report and sought advice from Headquarters on what administrative action should be taken against the Applicant.

On 20 October 1987, the Assistant Resident Representative informed the Applicant that his supervisor had recommended the withholding of his annual within-grade salary increment, due in December 1987, since his performance and conduct had "not been satisfactory during the last year".

On 9 November 1987, the Senior Policy Officer (Legal) of the UNDP Division of Personnel responded to the Resident Representative's letter of 17 September 1987 by outlining three possible approaches, as follows:

"The first one would be to provide Mr. Hossain with a written reprimand in the strongest terms indicating that his behaviour was totally unacceptable and completely unbefitting an international civil servant. Furthermore, he should be warned that any deviation in the future from the expected standards of conduct would have very serious consequences on his contractual status. If this approach is used, he should return to duties and be informed that his within-grade salary increment due in December 1987 will be withheld.

The second approach would be for you to inform Mr. Hossain that in view of his involvement in the Comilla incident, evidencing his lack of good judgement and causing embarrassment to the Organization, he will not be returning to service and he will not be offered renewal of appointment when it expires on 31 March 1988. In the meantime, his status would be converted from suspension pending investigation to special leave with full pay until expiration date. Naturally, he would not be granted the salary increment falling due in December.

> The third possibility would be for you to charge Mr. Hossain with misconduct based on the Comilla incident and that would necessitate following the procedure set forth in Personnel Manual Section 20902, i.e., charging him with the relevant misconduct and allowing him the opportunity to obtain the advice of any other staff member to assist him in the preparation of his defense. Thereafter, you would submit the relevant documents together with your recommendation regarding the disciplinary measure to DOP for transmittal to the Disciplinary Committee for its review of the case, pursuant to the provisions contained in circular UNDP/ADM/87/98, dated 8 October 1987, ...".

Pursuant to that advice the Resident Representative, by a letter dated 10 December 1987, informed the Applicant that his fixed-term appointment, expiring on 31 March 1988, would not be extended "because of [his] serious lack of good judgement in respect of the [Comilla] incident ... thereby causing considerable embarrassment and discomfort to the Organization". The Applicant was also informed that he would not be granted the salary increment due in December 1987 and that his status was being converted from suspension with full pay pending investigation to special leave with full pay until the expiration of his contract on 31 March 1988.

On 7 January 1988, the Applicant requested the Secretary-General to review the administrative decision by the Resident Representative. He also requested the UNDP Ombudsman Panel to review his case. On 18 July 1988, the Ombudsman Panel informed the Applicant that, after a thorough review, it had found and concluded that:

> "... the decision of the Resident Representative and the WFP Director of Operations on your case is a correct one. This view is not based solely on the Comilla incident alone but [is] also based on reviewing correspondences available in the personnel files at Headquarters, vis-à-vis the Standards of Conduct in the International Civil Service (United Nations 1954)."

On 22 August 1988, the Officer-in-Charge, UNDP Division of Personnel, informed the Applicant that, based on a thorough review of his case, the decision not to extend his fixed-term appointment was being maintained. On 20 September 1988, the Applicant lodged an appeal with the Joint Appeals Board. The Board adopted its report on 27 April 1989. Its conclusions and recommendation read as follows:

"Conclusions and Recommendation

29. The majority of the Panel concludes that the circumstances surrounding the appellant's fixed-term appointment and work performance created no reasonable grounds on which a legitimate expectancy for the appellant of continued employment with WFP beyond 31 March 1988 could have been based.

30. The majority of the Panel also concludes that the reasons given by the Administration for the decision not to extend the appellant's fixed-term appointment beyond 31 March 1988 were valid and justifiable.

31. The majority of the Panel further concludes that the appellant did not adduce sufficient evidence or present concrete facts to sustain the burden of proof required to establish that the Administration, in reaching the decision not to extend his fixed-term appointment beyond 31 March 1988, had been influenced by prejudice or other improper motivation.

32. Furthermore, the majority of the Panel concludes that non-renewal of a fixed-term appointment is not a disciplinary action.

33. Accordingly, the majority of the Panel makes no recommendation in support of the present appeal."

One member of the Board filed a dissenting opinion concluding that the Administration's decision was procedurally flawed and that the case should be remanded to the Administration for correction. He also recommended that compensation equivalent to three months' net base salary be paid.

On 31 May 1989, the Acting Under-Secretary-General for Administration and Management informed the Applicant that the Secretary-General, having re-examined his case in the light of the Board's report, had decided to maintain the contested decision and to take no further action on his case.

On 16 November 1989, the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. The decision not to extend the Applicant's appointment on grounds of misconduct was based on insufficient evidence and should be considered tainted by prejudice and improperly motivated.

2. The Respondent did not follow the procedures set forth in the UNDP Personnel Manual concerning disciplinary proceedings.

Whereas the Respondent's principal contentions are:

1. The Applicant's fixed-term appointment carries no right or expectancy of renewal.

2. The decision to permit the Applicant's fixed-term appointment to expire, rather than carry out further investigations, was a valid exercise of administrative discretion.

The Tribunal, having deliberated from 16 to 27 May 1991 in Geneva and from 14 to 17 October 1991 in New York, now pronounces the following judgement:

I. The Applicant's first plea, "before proceeding to consider the merits of the case" to call Mr. Manjurul Islam as a witness, cannot be entertained by the Tribunal. It is of the view that sufficient material already exists for a proper examination of all the issues raised by the Applicant, and accordingly the request to have Mr. Islam as a witness is rejected.

II. The long and rather complicated history of this case shows that, irrespective of many contradictory statements and a plethora of accusations and counter accusations, a clear picture emerges that at all levels of UNDP - from its headquarters in New York to the local office in Bangladesh - there was a prevailing and perhaps growing conviction that the Applicant should be separated from the service of UNDP as soon as possible, and certainly not later than 31 March 1988, when his latest fixed-term contract was to have expired.

III. The Tribunal first considered if such a conclusion reached by the Respondent was based on substantial facts and good reasons and, secondly, if in separating the Applicant the protection provided to him by all the

applicable Staff Regulations and Rules had been properly extended. In this context, the Tribunal examined whether the Applicant's complaints of prejudice and discrimination against him are justified.

IV. Specifically, the Applicant asserts that the Investigation Committee established by the Resident Representative at Dhaka was not fairly composed; that its proceedings were vitiated, particularly in the instance where it found that the Applicant had been involved in some incident concerning a prostitute, by the absence of two of its members at the time of the Comilla investigation, and by its being open to the influence of persons whom the Applicant considered were hostile to him. The Tribunal has not found in this and other allegations of the Applicant any substance or even acceptable evidence to establish any prejudice. Similarly, the Applicant makes much of the fact that while his driver was fully responsible for bringing the prostitute into the guest house where the Applicant and his driver were both staying, yet the Respondent treated the driver very lightly indeed, while the Applicant himself was severely penalized. Apart from the fact that the two persons concerned occupied different jobs and consequently had different degrees of responsibility, there is plenty of evidence to show that the non-renewal of the Applicant's appointment was the result of a culmination of a large number of complaints; the Respondent decided that as a consequence the Applicant could no longer be retained in service. The Tribunal finds that in the circumstances no charge of discrimination against the Applicant can be sustained.

V. On the basic question of the non-renewal of the Applicant's fixed-term contract, the Tribunal has repeatedly held that after a long period of satisfactory service, a staff member should be considered for further employment in the light of the totality of the circumstances prevailing at the time.

VI. In the present case, the Applicant could not in reason expect such extension, in view of the investigation that had taken place at the instance

of Mr. Sackett, Director of Operations, and in the light of the unsatisfactory PRR he had received for the period 1 November 1985 to 30 April 1987. It is also on record that Mr. Sackett warned the Applicant, before the Investigation Committee was established, that his work and standards were deteriorating and that he should be careful. The PRR, dated 13 May 1987, that found the Applicant's judgement "most unsatisfactory" and that he had "demonstrated an unacceptable lack of responsibility", was signed by the Applicant; in signing the report, he stated that he did not "agree with the ratings and the baseless comments as made by my supervisors". Nonetheless, the Tribunal notes that he did not challenge the assessment through the normal procedure for rebuttal; his argument that he could not do so because he had not received a copy of the damaging report, as he was entitled to, lacks conviction, for any staff member faced with a report of this kind would normally take all steps to ensure that he would obtain a proper assessment and not seek to defend his inaction on the plea that he had not received a copy of the damaging report, even though he had seen and signed it. The Tribunal notes that the last entry on the report, which might not have been seen by the Applicant, is written by Mr. Sackett who concluded: "I see no possibility of Mr. Hossain being usefully engaged by WFP henceforth."

VII. The Applicant claims that under General Assembly resolution 37/126 of 17 December 1982, he had a right to "reasonable consideration" for a career appointment after five years of service. The Applicant's first contract was in 1978, and so by 1983 he had already completed five years of satisfactory service. The paragraph below, reproduced from the Investigation Report of August 1987, indicates that he was not considered suitable for a probationary appointment, even when he had already completed seven years of service:

> "WFP management did not recommend Mr. Hossain for probationary appointment in November 1985 in the same specific manner as other WFP officers, but later merely forwarded his file for consideration by the A & P (Appointments and Promotions) Panel, when requested by Mr. Hossain to explain why he was not included on the original list."

The Tribunal concludes therefore that the Respondent's decision not to extend the Applicant's service under the General Assembly resolution was not, as the Applicant alleges, due to vindictiveness or prejudice, but was based on proper consideration given at least as far back as November 1985.

VIII. The Applicant also asserts that the incident at Comilla did not take place and his subsequent admission recorded by the local people was due to coercion and threats. Yet, although the incident took place on 16/17 March 1987, he made no report of it to the WFP office in Dhaka until 2 April - after nearly a fortnight.

IX. Taking all the factors into account, the Tribunal concludes that in the totality of the circumstances surrounding the termination of the Applicant's services, there was no reason to believe that the Respondent did not give adequate consideration to his continued service or that the Respondent's view that the Applicant could no longer be retained was based on whimsical, prejudicial or discriminatory grounds. The investigations of the various allegations made against the Applicant were reasonably thorough in the circumstances. The Respondent drew the conclusion from the investigations that the Applicant should be separated. It remains only to consider if the actions taken by the Respondent to terminate the Applicant's service were in any way vitiated by lack of due process and, if so, the extent to which such a lack could come in the way of fair treatment, and finally, whether in the circumstances of this case the Applicant is entitled to any monetary compensation.

X. When on 13 May 1987 Mr. Sackett, WFP Director of Operations a.i., recommended to the Resident Representative, UNDP, at Dhaka that the Applicant be suspended "with immediate effect pending his dismissal for misconduct", he was obviously initiating disciplinary proceedings, even though the words "pending his dismissal" seem to anticipate the final outcome of such proceedings. Again, on 25 May 1987, when the Resident

Representative established an Investigation Committee, he was confirming that the Applicant was indeed being proceeded against under Chapter IX of the UNDP Personnel Manual for locally recruited staff, entitled "Reprimand, Suspension, Disciplinary Procedures, Ombudsman Panel and Appeals" (Rev. 3, 20900-20901, December 1983), which applied to the Applicant. A few days later, on 9 June 1987, the Applicant was informed that "in accordance with staff rule 110.3" he was suspended "from work with pay as of 9 June 1987 pending further investigation of the case".

Meanwhile, there is evidence of "further deterioration in the office work environment" and of some discussion between the Applicant and the Resident Representative - but details relating to these matters are not available.

XI. As a holder of a fixed-term contract expiring on 31 March 1988, the Applicant's employment with the Respondent would have ceased on that date, especially as the Administration seems to have decided, on due consideration, not to grant him any extension. In view of this, the Applicant's suspension on 9 June 1987 could only mean an intent to bring about an earlier separation. However, once the Investigation Committee reported on 19 August 1987, the Resident Representative felt it necessary to refer the case to UNDP Headquarters in New York, as he was "uncertain about how best to proceed and ... would appreciate having [the Senior Legal Adviser, UNDP's] comments and advice". This advice was forthcoming on 9 November - when the Applicant was still under suspension - and gave the Resident Representative a choice of three courses of action. He decided in the circumstances to inform the Applicant that because of "your serious lack of good judgement" in respect of the incident at Comilla "you will not be returning to the service ... when your contract expires on 31 March 1988"; thereupon the Applicant's status was "converted from suspension with full pay pending investigation to special leave with full pay".

XII. In other words, the disciplinary proceedings which had been started were dropped and the Applicant was simply informed that his separation would

be effective from 31 March 1988. The Tribunal finds no provision in the Staff Regulations and Rules of the United Nations or of UNDP which would allow withdrawal of a suspension order pending full investigation and simultaneously ensuring the separation of a staff member on a fixed-term contract. This easy way out cannot be justified by the Respondent's present argument that "rather than expending further funds", he decided simply to let the Applicant's fixed-term appointment expire. This argument was not included or expressed anywhere before and, in any event, the option of terminating the Applicant's contract on 31 March 1988 was always open to the Respondent who, however, decided to initiate disciplinary proceedings by suspending the Applicant. In the circumstances, the Tribunal cannot but conclude that proper procedure and due process were not fully followed, and must now decide the extent of damage the Applicant might have suffered as a consequence.

XIII. The Tribunal notes in this context that the Applicant contested the decision to separate him first to the UNDP Ombudsman Panel, which was the appropriate body for this purpose at that time, and later applied to the Respondent for rescission of the decision of the Resident Representative and for an extension of his fixed-term contract. Finally, he appealed to the Joint Appeals Board. On each of these occasions his request was turned down, except that one member of the Joint Appeals Board in a minute of dissent upheld his contentions in several respects and concluded that the case should either be sent back for "correction of the procedure" or "the Administration may wish to seek a settlement" with the Applicant. The Secretary-General agreed with the views of the Joint Appeals Board. The Respondent further accepted the Ombudsman Panel's finding that the Resident Representative had acted entirely correctly and decided, on 31 May 1989, to take no further action in this matter, as recommended by the Joint Appeals Board.

XIV. After reviewing all the facts of the case, the Tribunal concludes that the Applicant's pleas and contentions received repeated and detailed

consideration at different stages and that there has been no miscarriage of justice in the decision taken by the Respondent not to renew the Applicant's appointment after 31 March 1988. At the same time, the Tribunal holds that, in many instances, correct procedure and due process were not adequately followed; for instance, the investigation report was not given to the Applicant for comments. These omissions do not, in the view of the Tribunal, change the final outcome, but inasmuch as the Applicant was entitled to the full protection of the Regulations and Rules at all times and since such protection was not scrupulously extended to him, he suffered damage for which monetary compensation would be in order. The Tribunal assesses this at $2,000.

XV. Accordingly, the Tribunal:

(a) Orders the Respondent to pay to the Applicant US$2,000;

(b) Rejects all other pleas.

(Signatures)

Roger PINTO
President

Ahmed OSMAN
Vice-President

Samar SEN
Member

New York, 17 October 1991

Jean HARDY
Acting Executive Secretary